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In The

Supreme Court of the United States

October Term, 1995

GREAT FALLS EYE SURGERY CENTER
and BRUCE L. ERICKSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Is a conviction of violating 18 U.S.C. § 287 (False Claims) proper if it is based on concurrent billing for anesthetist's services where the underlying Medicare billing regulation is unclear; where the actual language of the regulation was not presented to the jury; where the judge did not resolve the meaning of the instruction but, instead, gave a misleading instruction, and where a number of lay witnesses were allowed to testify as to what the regulations meant?

2. Given the circumstances of this case, including those set forth in Question 1, and the extensive inquiry by the defendants of government officials as to the proper billing method under the regulations, was the giving of a deliberate ignorance instruction under *United States v. Jewell*, 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976), appropriate?

PARTIES TO THE PROCEEDING

GREAT FALLS EYE SURGERY CENTER
and DR. BRUCE L. ERICKSON,

Petitioners,

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JOINT PETITION FOR WRIT OF CERTIORARI

Great Falls Eye Surgery Center and Dr. Bruce L. Erickson respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported in *United States v. Erickson, et al.*, 75 F.3d 470 (9th Cir. 1996) and is reprinted in the Appendix at App. 1.

The Judgment and Commitment of the United States District Court for the District of Montana, *United States v. Erickson and Great Falls Eye Surgery Center*, No. CR-93-036-GF (D. Mont. June 13, 1994) (App. 26), *as amended* (June 23, 1994) (App. 30) are unreported.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was filed on January 22, 1996. This Petition for Certiorari was filed within 90 days of the date of the judgment. Accordingly, this petition is filed within the time allowed by law. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes, rules and regulations involved in this case are as follows and are set forth in the Appendix: 18 U.S.C. § 287 (Federal False Claims Act) (App. 33);

42 C.F.R. § 405.552(a)(1)(vi) (1990) (Health Care Financing Administration, HHS) (App. 35-36);

42 C.F.R. § 405.553(b)(2) (1989) (App. 34-35);

42 C.F.R. § 414.46(a)(2) (1992) (App. 36-37);

Federal Rule of Criminal Procedure 7(C)(1) (Nature and contents of Indictment) (App. 38);

Federal Rule of Evidence 704 (Opinion on ultimate issue) (App. 39).

STATEMENT OF THE CASE

1. The Anesthesia Practice of the Surgery Center and Conviction Under Count III (False Claims).

Dr. Bruce Erickson is an ophthalmologist. Reporter's Transcript [RT] 792. He did much of his eye surgery in an ambulatory surgery center owned by the Great Falls Eye Surgery Center, Inc. [Surgery Center]. RT 792, 797-8. Most of Dr. Erickson's eye surgery patients were cataract surgery patients, eligible for Medicare. RT 669-70, 683-4. He accepted Medicare assignment which greatly reduced the co-payment obligation of the patient. RT 803-4. Dr. Erickson charged a surgical fee for his eye surgeries and the Surgery Center charged a facility fee for each surgery as well as a fee for anesthesia services administered by a Certified Registered Nurse Anesthetist [CRNA]. RT 407, 522-7. Only the anesthesia charges are at issue.

An Indictment filed in United States District Court for the District of Montana charged Dr. Erickson and the Surgery Center with one count of violation of 18 U.S.C. §§ 1341 and 1343, Mail Fraud, Count I, and two counts of felony violation of 18 U.S.C. § 287, False Claims, Counts II and III. Clerk's Record [CR] 1. At trial, March 7-12, 1994, the jury reached no verdict on Counts I and II, and

a mistrial was declared on those Counts. RT 1065. The jury found both Defendants guilty on Count III of the Indictment (False Claims). RT 1061-2. Count III charged that the Center overcharged Medicare for the surgical anesthesia services during the period of July 23, 1992 through June 1993. CR 1.

Dr. Erickson individually did not bill Medicare for the anesthesia. RT 811-12. He was alleged to be criminally responsible as medical director of the Surgery Center and as a principal in the Surgery Center. CR 1. The Surgery Center at first relied on the anesthetist to bill anesthesia services. RT 802-3. The anesthetist met and discussed with Blue Cross/Blue Shield of Montana [Blue Cross][1] the anesthetist's billing of anesthesia services provided at the Surgery Center. RT 684. The Center assumed the billing task when the anesthetist became frustrated with dealing with Medicare. RT 681-3, 689, 802-3, 810-11, 982-3.

The central issue is that the Surgery Center billed concurrently for anesthesia services, meaning that the CRNA was tending to (and billing for) more than one patient at a time. The U.S.'s position is that anesthesia billing could only be for one-on-one services by an anesthesia provider.

The Surgery Center had a room with four chairs with monitors for vital functions; patients occupied the chairs before and after their eye surgery. RT 562-7. When the patient first arrived, after a brief stabilization and evaluation period, the CRNA administered the first anesthetic, a

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[1] Blue Cross is the intermediary for Medicare. RT 412-3. As intermediary, Blue Cross processes bills, educates providers and answers billing questions. RT 421-2, 436.

general sedative. RT 670-1. After the patient had assimilated the sedative, the CRNA then administered the retrobulbar block – local anesthesia delivered with a needle behind the eye to deaden the area and ensure that the eye is immobile for the surgery. The CRNA then monitored the patient after this block. RT 672-677. When the anesthetic took effect, the patient went to the surgery suite which was only seven or eight steps through a corridor. RT 559-582. In the meantime, other patients would arrive on a staggered schedule and the CRNA would treat them concurrently. While the patient was in surgery, the CRNA would monitor the patient via the video of the surgery in progress and the EKG and blood pressure monitors visible. After surgery, the patient would be moved back to the original room and continue to be monitored by the CRNA. The patient, if accompanied, could go home soon afterward. RT 570.

The Surgery Center billed the patients (and, consequently, Medicare) for anesthesia services for all times in which the patient was under the attendance of the CRNA – i.e., from the initial intake until discharge. As a consequence, the Surgery Center was submitting billing statements for CRNA services provided simultaneously to more than one person at a time. The Surgery Center did not attempt to hide this billing practice. In fact, each CRNA who practiced at the Surgery Center testified he believed the billing was proper because he was continuously monitoring and caring for the patient during all times billed. RT 700-5, 856-7.

2. The Dispute as to Proper Medicare Billing.

The government's position is that the Surgery Center engaged in false billing practices because it billed for this concurrent attendance. CR 1.

The Medicare billing regulations changed over the period of time covered by the Indictment. When the Surgery Center began billing for anesthesia services in January of 1990, Medicare reimbursed anesthesia providers for time spent based on "units," one unit for each fifteen minutes of anesthesia time. 42 C.F.R. § 405.553(b)(2) (1989) (App. 34). In January of 1990, Medicare regulations said "anesthesia time" began when the "anesthetist begins to prepare the patient for induction of anesthesia and ends when the . . . anesthetist is no longer in personal attendance." *Id.*

On November 25, 1991, the Medicare definition of anesthesia time was changed to add "continuous actual presence." 56 Federal Register No. 227, Monday, November 25, 1991 at 59560. Ad. 17. The final version published in the October 1, 1992 edition of the Code of Federal Regulations read:

> (2) *Time units* involve the continuous actual presence of the physician (or of the medically directed qualified anesthetist or resident) and start when he or she begins to prepare the patient for anesthesia care and ends when the anesthesiologist (or medically directed CRNA) is no longer in personal attendance, that is, when the patient may be safely placed under post-operative care.

42 C.F.R. § 414.46(a)(2) (App. 36-37).

The unsettled nature of the billing practice in this area was addressed by the Government in comments in the *Federal Register* on November 25, 1991. *Supra.* These comments dealt with a proposal to eliminate actual time and adopt average time for billing anesthesia procedures. Although it was decided to continue temporarily to use actual time for the final rule, the government said

> [w]e continue to have serious reservations about paying anesthesia services on a different basis than all other physician services. We also continue to believe the current definition of "anesthesia time" *is not precise* and leads to wide variation in the reporting of time and is subject to abuse. We will be analyzing the issue how to pay for anesthesia services in the future.

Id. at p. 59560 (emphasis added).[2]

A publication of the *American Association of Nurse Anesthetists*, in November 1992, published an article reflecting the confusion regarding the concurrent provision of anesthesia services by CRNA's at ophthalmic surgery centers.

> The nature of anesthesia practices in OSC's (Ophthalmic Surgery Centers), with its emphasis on pre-operative blocking of patients and the possibility of having several patients blocked at the same time, may have resulted in *some confusion about Medicare billing*.

Ex. 521; RT 206-207 (emphasis added).

Confusion as to the proper approach to billing permeated the trial because neither the regulations nor their specific language were placed in the record. *See* Index to exhibits, RT vii-viii. Instead, the government advanced its case initially solely through witness testimony regarding the meaning of Medicare regulations. RT 186-228. After the cross-examination of government witness Gunn

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[2] Mr. James Menas, of the government's Health Care Financing Administration who was responsible for drafting the regulations, testified that he was not even aware of the practice of CRNA's treating more than one person at a time. RT 468. Accordingly, he did not design the regulation to address that billing practice.

referred to the 1989 "CPT" it was introduced into evidence. That document "Current Physician Terminology," was identified as a document to be used "for Medicare billing," although its official status was not established in the record. *Id.* The relevant provision was read into the record which said that anesthesia time ends "when the anesthesiologist is no longer in *personal attendance. . . .* " (Emphasis added). RT 230. It said, however, that "time for anesthesia procedures may be reported as customary in the local area." Although there was a vague reference by government witness Gunn to the fact that the word "continuous" may have been added to the "personal attendance" standard at some point,[3] the 1992 amended regulation or its specific wording never came into evidence. RT 231.

Also admitted were two "guidelines" of the American Association of Nurse Anesthetists. Exs. 528A (1989) and 528B (1992). RT 212. Those dealt with the standard of medical care, rather than billing and used the term "constant attendance." *Id.* at 232.

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[3] Government witness Ira Gunn was asked whether, "From your own recollection . . . ," the 1989 CPT language changed. Gunn stated:

> A. The only – *if it has* changed, and there was some discussion to add one word to that and that was in relation to continuous personal attendance. The Government Accounting Office requested – and probably that was about in 1991 – to add the word continuous.

RT at 231 (emphasis added).

3. Attempts by the Surgery Center to Ascertain the Proper Way to Bill.

Even though the Indictment (CR 1, ER 1-4) alleged the billing was improper from January 1990, when the Surgery Center began billing anesthesia, and even though Blue Cross internally questioned this billing when the Surgery Center submitted its first anesthesia bills, no Blue Cross or Medicare official told the Surgery Center or Dr. Erickson of any problems or even questioned them until July 1992. RT 643-5, 815, 850-1. No anesthesia bills were ever rejected for that reason. RT 394-6, 644-5.

During the Count III period after July 22, 1992 when Medicare, in the person of Office of Inspector General [OIG] Agent Alphonse Gomez, told the Surgery Center of objections to the billing, the Surgery Center changed its method of billing for anesthesia, although concurrent treatment and billing therefor continued in some variation. RT 853-7. Despite several requests, Blue Cross, at the direction of the Office of the Inspector General, refused to tell the Surgery Center employees whether they were billing anesthesia correctly. RT 857-66. Surgery Center employee Jeryl Robinson asked Agent Gomez how to bill for anesthesia during his visit on July 23, 1992. RT 851. He told her to contact the intermediary, Blue Cross. RT 851. On July 28, 1992, she contacted an employee at Blue Cross who promised to find out and tell her, but never did. RT 861. She called Dick Jackson with Medicare's regional office in Denver, Colorado. RT 861-2. He referred her back to Blue Cross. RT 862. She called Carol Fox at Blue Cross several times, each time Fox said that she would "get back" to Robinson with an answer. RT 862-3. She never did. RT 862-3. She then called Hal Rawson, a Blue Cross senior executive. RT 865. Rawson took down Robinson's questions and promised to "call back." RT 865. A

week later, Robinson received a call from Jan Redmond at Blue Cross advising her to refer questions to the same Agent Gomez, who had told her to call Blue Cross. RT 865-6. Her efforts are also documented by internal memoranda of Blue Cross.

For example, an internal E-mail memorandum from Jan Redmond of Blue Cross, dated 9/9/92 to fellow employee, Carol Fox, referred to the Surgery Center inquiries, stating:

> I think they need to be given the correct way to bill but we need to make sure we are in tune with what Al [Gomez] is doing. The data Al has in his case is set and anything from here on should not affect his case.

RT 384; Ex. 550F. In reply, Carol Fox said by E-mail: "That's okay but Erickson's office is getting persistent. . . . " Defendants' Ex. 550G.

Later, Surgery Center attorney Doubek wrote the federal Department of Health and Human Services regarding CRNA billing procedures. On November 16, 1992, that agency responded:

> Blue Cross/Blue Shield of Montana has been instructed not to respond to questions from Dr. Erickson about CRNA billing issues. The reason behind these instructions is that we want to be sure Dr. Erickson does not get conflicting billing instructions.

Gov't Ex. 10. Blue Cross witnesses acknowledged that they never did give information to the Surgery Center on the correct way to bill. RT at 385. In the meantime, none of the Surgery Center's anesthesiology bills were rejected by Blue Cross during this period – they were all paid. In the face of these repeated attempts to determine how to bill properly, the district court gave a "deliberate ignorance" instruction, allowing the jury to find a "knowing"

violation based on a determination that the defendants deliberately avoided learning the proper way to bill. App. 40.

4. The Indictment's Failure to Incorporate the Controlling Regulation.

Count III of the Indictment charged a violation of 18 U.S.C. § 287,

> [w]ell knowing that these claims, while not reflecting overlapping patient attendance, were false and fraudulent in that they were demands for payment of anesthesia services that were, in whole or in part, *not rendered by a physically present provider* and were, . . . not allowable under the regulations providing for Medicare reimbursement, in violation of 18 U.S.C. § 287.[4]

(Emphasis added).

Although the Indictment generally refers to the "regulations providing for Medicare reimbursement," no specific regulation is cited in the Indictment as required by Rule 7(C)(1), F.R.Crim.P.[5]

Prior to trial, the defendants moved to dismiss based on the failure to cite a regulation in the indictment and based on the ambiguity in the regulation the government was apparently relying upon. In response, the United States stated,

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[4] The words "physically present provider" are not found in either the 1989 or 1991 version of the regulation. *See* 42 C.F.R. § 405.553(b)(2) (1989) and 42 C.F.R. § 414.46(a)(2) (1992) (App. 34-37).

[5] Rule 7(C)(1), F.R.Crim.P. says: "[T]he indictment or information shall state for each count the official or customary citation of the statute, rule, *regulation* or other provision of law which the defendant is alleged therein to have violated." (App. 38) (emphasis added).

> The United States does not charge, or even mention, a violation of health care billing regulations, in the indictment.

U.S. Brief in Response to Motion to Dismiss, February 23, 1994, p. 4. That is plainly false. Count III of the Indictment alleges a violation of Medicare regulations, ("not allowable under the regulations providing for Medicare reimbursement"). Moreover, the case is entirely about a claimed violation of the Medicare billing regulations. This is material because, as noted above in Section 2, the regulations were modified during the time period covered by the Indictment and there was a great deal of confusion about how to bill properly.

The regulation relied upon by the Ninth Circuit in affirming, 42 C.F.R. § 414.46(a)(2), was not published in the C.F.R. until October of 1992, a date well into the period covered by Count III of the indictment. 75 F.3d at 475, 476. That amendment is the one that adds the words "continuous actual presence." (App. 36).

The District Court failed to rule prior to trial on Defendants' motion to dismiss, but denied it on the first day of trial, stating merely: "On the motions to dismiss, first, I am just going to deny them summarily. . . . " RT 2.

5. The Trial: The Allowance of Nine "Non-Expert" Witnesses to Establish the Standard of Criminal Conduct.

Over objection (CR 30, 31), the Court allowed witness testimony about proper billing practices, stating, at the beginning of the trial:

> On this testimony relating to Medicare coverage, again, I think I will just kind of sit and listen and play it by ear as we go. I am not going to allow the so-called experts or whatever legal opinions there. On the other hand, I think we

> are in this forest, the thicket of regulation and things. There has to be some kind of – if you want to – industry practice or whatever, sort of thing. And I think this case (*United States v. Gold*, 743 F.2d 819) pretty well says (that). . . .

RT at 12. The precise foundation and purpose for this testimony was left unclear. Some of the witnesses seemed to be testifying merely as to how they performed and billed anesthesia services.[6] Contrary to the judge's caveat, however, others gave testimony on the meaning of the Medicare regulations.[7]

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[6] For example, Dennis Kramer, a CRNA in Billings, Montana, who did not do much cataract surgery work, testified that he serviced more than one patient at a time at the Hardin Hospital, but did not bill for more than one patient at a time. RT 337. He admitted he had no legal training and that he was not purporting to state that his practice set the standard of what may or may not be legal. *Id.* at 339. Nurse Ken Schultz, a CRNA from Billings, testified that he never bills for times when not with a patient. RT at 325. Then he purported to offer testimony based on knowledge gleaned from professional meetings ("at national meetings or other meetings there's conversations of, you know, proper billing of that type . . . "). *Id.* Both Dan Simonson, a CRNA from Spokane, Washington, and Ira Gunn, a teacher from El Paso, Texas, testified that there are two schools of thought on whether concurrent anesthetist service is appropriate. Gunn was with the "stay-with-them school of thought," *Id.* at 202, while Simonson felt it was "safe, convenient and cost-effective" to treat patients concurrently. *Id.* They both, however, argued that billing could be only for one patient at a time.

[7] Diane Fisher, another CRNA from Billings, whose experience in this area was very limited, testified that she had never induced anesthesia in more than one patient at one time and that what she does " . . . is the legal standard that comes from Medicare regulations." *Id.* at 349.

These witnesses numbered nearly half of the twenty-one witnesses called by the government. Their testimony covers 198 pages of transcript, RT 186-363, 460-481.

Even the district court evidenced uncertainly about the appropriate way to bill. At one point in the trial, the "Guidelines" of the American Association of Nurse Anesthetists (AANA) were addressed in cross-examination:

> Q. What does the question personal attendance mean under the AANA guidelines?
>
> A. Personal attendance?
>
> Q. What – does it mean personal attendance to 13 people or does it mean personal attendance one-on-one?
>
> THE COURT: *Doesn't say one-on-one.*

RT 733 (emphasis added). Thus, even the court at that point seemed to reject the government's theory that "personal attendance" meant "one-on-one."

After denial of the motions to exclude such testimony, the defense moved for a cautionary instruction on the effect of expert testimony, which the district court refused. When the issue was raised on appeal, the United States made the argument that these witnesses were not

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Nurse Ira Gunn testified that she was involved with the American Association of Nurse Anesthetists when the Tax Equity and Fiscal Responsibility Act of 1982 was enacted "which changed a lot of the regulations under which nurse anesthetists practice and reimbursement took place." *Id.* at 187. Without identifying specific regulations, Nurse Gunn was allowed to testify that TEFRA-related regulations "required personal attendance for continuous attendance. . . . " *Id.* at 189. In fact, one of the questions suggested "Ma'am, when we were talking about *what is permissible to bill to Medicare, . . . ?*" *Id.* at 191 (emphasis added). She even testified that Medicare's billing regulations were "clearer than a lot of other government regulations that I have seen." RT 198.

offered as "experts" and, therefore, no such cautionary instruction was necessary.[8] The Ninth Circuit upheld the government's rationale, finding that these witnesses were lay witnesses regarding "industry practice and common understanding of billing instructions." *United States v. Erickson*, 75 F.3d 470, 476 (9th Cir. 1996) (App. 8).

6. The Failure to Instruct on the Law.

After hearing this legal testimony, the jury was never instructed regarding "continuous actual presence," the words of the 1992 regulation.[9] Instead, the court instructed, using the words of the Indictment (demands for payment of anesthesia services that were . . . not rendered by a "*physically present provider*." Not only is this term not found in the regulation that applies to anesthetists, it is found in a companion regulation (42 C.F.R. § 405.552(a)(1)(vi)) and its meaning is entirely consistent with defendants' acts in this case. (*See* Argument I.A. below).

Apart from these problems, the government's burden was weakened because the Court, over objection, gave a "deliberate ignorance" instruction which allowed the jury to find that the defendants acted "knowingly" if they "deliberately avoided learning the truth." (App. 40). This

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[8] One would think that the need for a cautionary instruction would be even greater if the testimony were not from experts.

[9] The Ninth Circuit's vagueness analysis addresses this language, "continuous actual presence," even though that was not the language given to the jury, finding that, "*When placed in context*, this regulation is not unconstitutionally vague. . . . " 75 F.3d at 475 (App. 8) (emphasis added). The Ninth Circuit's vagueness analysis does not address the language submitted to the jury – "physically present provider." *Id.*

enabled the jury to reach a finding of guilt based on an assumption that the defendants should have known of general industry practice but deliberately avoided determining that practice.

The net result was that: (1) to the extent the trial judge instructed the jury at all on the Medicare regulations, it instructed incorrectly; (2) the actual language of the Medicare regulation was never presented to the jury; (3) the jury was allowed to hear witness testimony both as to industry practice and as to the meaning of the (absent) Medicare regulations. The witnesses, not the judge, informed the jury as to what the law was, resulting in the distinct possibility that the jury convicted on breaches of "common understandings" or "industry practice."

7. Basis for Federal Jurisdiction in the Court of First Instance.

The basis for federal jurisdiction in the Federal District Court for the District of Montana was 18 U.S.C. § 3231 which provides in relevant part: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court, in *Cheek v. United States*, 498 U.S. 192 (1991), noted the proliferation of statutes and regulations in the tax field which "has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations" imposed by law. *Id.* at 199-200. The confusion has only increased in many other

areas of the law, including the present one involving Medicare regulations.

Complex statutes and regulations, such as the Medicare regulations at issue in this case, have forced litigants to go to great lengths to explain these statutes and regulations to a jury. Attempts to elucidate these laws have spawned the use of "expert" and "quasi-expert" testimony. As one commentator has noted, "[c]ases involving complicated statutes that are difficult to understand or interpret – such as complex tax and securities cases – have become a battleground in the conflict over the admissibility of expert legal testimony." 97 Harv. L. Rev. 797, 801, "Expert Legal Testimony." "Expert legal testimony is not only covertly admitted as testimony on mixed questions of law and fact, but also openly permitted in many cases." *Id.*

Not only is there a conflict among the Courts of Appeal on the use of expert witnesses, the law is largely in disarray. As a result, trial courts, such as the district court below, are floundering in a rather chaotic milieu with inadequate guidance as to how to proceed. The district judge below probably acted quite typically when he said: "I think I will just kind of sit and listen and play it by ear as we go." RT 12.

The district court in this case took guidance from the Eleventh Circuit's decision in *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985), a case in which the court upheld the admission of expert legal testimony by a Health Care Finance Administration official and a Health and Human Services Special Agent regarding proper Medicare billing practices, stating:

> It is well established that Fed. R. Evid. 704 permits a witness to express an opinion as to an ultimate issue that must be decided by the trier of fact.

Id. at 817. *Gold*, however, noted that the trial judge was careful to instruct the jury about the weight that should be given such expert testimony. *Id.*

To the contrary, the Ninth Circuit held in *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993), *as amended*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995), that the district court erred[10] in failing to decide the issues of law raised by the parties instead the district court resorted to "consigning the interpretation of law to the jury." 35 F.3d at 1287. The court was troubled by the absence of adequate instruction to the jury on the weight to be given to the expert testimony. Also contrary to *Gold* are numerous other court decisions set forth in Argument I.B., below. *See also Police Retirement System of St. Louis v. Midwest Invest. Advisory Serv.*, 940 F.2d 351 (8th Cir. 1991). That court noted, notwithstanding the highly prejudicial nature of such testimony, that the prohibition concerning opinions on the law has eroded over time – a result the Eighth Circuit found to be disturbing: *"We cannot agree that the trend is a good one."* 940 F.2d at 357 (emphasis added). The general disarray of the law is reflected in many other circuit cases set forth in the Argument, *infra*.[11]

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[10] Although it found the error harmless. 35 F.3d at 1287.

[11] The difficulty courts have in establishing a standard concerning the admission of opinions couched in terms of a legal standard is reflected in Weinstein's treatise, in footnote 10 where Judge Weinstein notes the following cases: *United States v. Jungles*, 903 F.2d 468 (7th Cir. 1990) (in prosecution for income tax evasion, improper to exclude testimony of defendant's experts supporting theory that the defendant wasn't an "independent contractor"; however, the court noted that to the extent the expert's testimony simply would have recited legal principles concerning the "independent contractor" relationship, exclusion of the testimony was proper); *United*

The question of use of expert legal testimony in a jury case is particularly important in criminal cases for obvious reasons. *See, e.g., United States v. Pomponio*, 429 U.S. 10, 12 (1976) (describing willful conduct under 26 U.S.C. § 7206 as "voluntary intentional violation of a known duty" which requires that the duty involved must be knowable). *See also James v. United States*, 366 U.S. 213, 221-22 (1961).

Moreover, the district court below erroneously extended the holding in *Gold* to allow persons it apparently considered *lay witnesses* to offer legal opinions on the ultimate issue before the trier of fact. Not only did the district court's ruling, as affirmed by the Ninth Circuit, highlight the conflict among the circuits on this important evidentiary issue, its extension of *Gold* to permit lay witness testimony on the meaning of complex federal regulations is an unprecedented departure from the "accepted and usual course of judicial proceedings . . . " and thus calls for the "exercise of this Court's supervisory powers." S.Ct. Rule 10(a).

States v. Toushin, 899 F.2d 617 (7th Cir. 1990) (in prosecution for making false statements on tax returns, IRS agent may properly testify that certain funds were not "income" reportable in earlier tax years.); *Montgomery v. Aetna Casualty & Sur. Company*, 898 F.2d 1537 (11th Cir. 1990) (in action for breach of insurance contract, error to allow expert to testify about the scope of the insurance company's duty and to the policy; expert opinion that the defendant had a duty to hire a tax counsel is a legal conclusion); *Andrews v. Metro North Commuter R.R. Company*, 882 F.2d 705 (2d Cir. 1989) (in personal injury suit against the railroad, plaintiff's expert could not testify that railroad was "negligent"); *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985) (questioning of lay witness as to whether plaintiff had been discriminated against because of her national origin was improper because it called for an improper legal conclusion). J. Weinstein and M. Berger, 3 *Weinstein's Evidence*, ¶ 704[02] at 704-11-12 n. 10 (1995).

ARGUMENT

I. THE CONVICTION WAS FAULTY BECAUSE IT WAS BASED EITHER ON FAULTY INSTRUCTION ON THE LAW OR IMPROPER WITNESS TESTIMONY.

The conviction below could have resulted either from the district court's instruction, which was faulty, or from an indefinite standard of conduct as set forth by witness testimony. In either case, the conviction is invalid and must be overturned.

A. THE JUDGE'S FAULTY INSTRUCTION.

As noted, the specific Medicare billing regulations were never put into the record and the district court never instructed the jury on the actual language of the regulation. Instead, the judge instructed, using the words of the Indictment:

> submitted or caused to be submitted, for Medicare payment, claims for anesthesiological services, well knowing that those claims, while not reflecting overlapping patient attendance, were false and fraudulent, in that they were demands for payment of anesthesia services that were, in whole or in part, not rendered by a *physically present provider* and were, therefore, not allowable under the regulations providing for Medicare reimbursement, alleged to be in violation of Title 18 U.S.C. § 287.

75 F.3d at 475 (App. 6-7) (emphasis added).

Thus, in an obtuse way, the court told the jury that the standard is *physical presence* – (" . . . services not rendered by a physically present provider and . . . , *therefore not allowable under the regulations* providing for Medicare reimbursement . . . " [emphasis added]). But

what does "physical presence" mean? The jury was never told.

Significantly, the term "physically present" is used in a companion regulation dealing with the practice of an M.D. (anesthesiologist) supervising up to four concurrent procedures. 42 C.F.R. § 405.552(a)(1)(vi), (2) (1990) (App. 36). Under that regulation such physician is "*physically present* and available" when supervising "no more than four anesthesia procedures concurrently" and therefore may bill for same. *Id.* (emphasis added). That is exactly how the CRNA's at the Surgery Center were billing – for concurrent procedures at which they were "physically present," under the same meaning of the term.

Ironically, the Ninth Circuit's opinion drew a distinction between the "physically present" language of the anesthesiologist regulations and the "continuous actual presence" language of the 1992 amendment to the anesthetist regulation, finding:

> [t]his difficult standard supports the view that "continuous actual presence" requires *more than mere physical availability*.

75 F.3d at 476, n. 3 (App. 10) (emphasis added).

Without defining "physically present" in some different way, it must mean, as a matter of law, what the companion regulation (42 C.F.R. § 405.552(a)(1)(vi) (1990)) says it means – that a provider is "physically present" when supervising up to four concurrent procedures. Applying this definition as a matter of law, Petitioners could not have been rightfully convicted for submitting false claims for concurrent services.

As the Court said in *Cheek v. United States*, 498 U.S. 192 (1991), "in 'our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law,' and ' "it is not the purpose of the law to

penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.' " *United States v. Bishop*, 412 U.S. 346, 360-361 (1973) (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943))." *Id.* at 205.

B. CONVICTION ON A DIFFERENT STANDARD SET FORTH BY WITNESS TESTIMONY.

In the alternative, the jury may have convicted because it found criminal conduct based on the standard set forth by witness testimony. If it did, the conviction remains equally as faulty.

Rule 704 of the Federal Rules of Evidence allows testimony on the ultimate issue. *See* App. 39. The Original Advisory Committee's Note to Rule 704 makes clear, however, that "[t]he abolition of the ultimate issue rule does not lower the bars so as to admit all opinions." Original Advisory Committee Note on Rule 704, *reprinted in* J. Weinstein and M. Berger, 3 *Weinstein's Evidence*, at 704-4 (1995). One area of ultimate opinion testimony generally rejected by courts is expert testimony on the meaning of the law. *See, e.g., United States v. Scop*, 846 F.2d 135, 140 (2nd Cir.), *rev'd in part on reh'g on other grds*, 856 F.2d 5 (1988); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 368 (4th Cir. 1986); *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984); *Police Retirement System of St. Louis v. Midwest Invest. Advisory Serv.*, 940 F.2d 351, 357 (8th Cir. 1991); *Weitzenhoff*, 35 F.3d at 1287.

This is so, for several reasons, including the concern that when a jury hears from an expert that a defendant acted in a certain way, or that certain regulations mean something, such testimony is essentially an "instruction on guilt." Saltzburg, Martin and Capra, 2 *Federal Rules of Evidence Manual*, at 1169 (6th ed. 1994); Weinstein & Berger, 3 *Weinstein's Evidence*, ¶ 704[02] at 704-12 (legal

opinion testimony supplies the "jury with no information other than the [witnesses'] view of how its verdict should read.").

A fundamental problem with testimony on the meaning of the law is that such testimony goes beyond the proper role of the witness and intrudes upon the function of the trial judge – to instruct the jury as to the requirements of law that apply to particular facts of the case. Saltzburg, Martin and Capra, *supra* at p. 1174. Another problem with such testimony is the possibility of confusion when the judge and the expert convey different information to jurors, *"a danger which does not exist when there is no conflict between the expert's definition and the legal definition."* Weinstein & Berger at 704-13 (emphasis added). This is clearly a problem here. Yet another problem is that "jurors will turn to the expert, rather than to the judge for guidance on applicable law." *Id.* (*citing* cases).

These points were made clear in *United States v. Scop*, 846 F.2d 135 (2nd Cir. 1988). There, the defendants were charged with violation of federal security statutes. The government called as an expert witness, a chief investigator for the SEC. The Eleventh Circuit found the expert's testimony was in essence a highly prejudicial legal opinion and went well beyond the province of an expert in security trading.

> It is true that Fed. R. Evid. 704 states that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *However, Rule 704 was not intended to allow experts to offer opinions embodying legal conclusions.*
>
> * * *

> Had [the expert] merely testified that controlled buying and selling of the kind alleged here can create artificial price levels to lure outside investors, no sustainable objection could have been made. Instead, however, the [expert] made no attempt to couch the opinion testimony at issue in even conclusory factual statements *but drew directly upon the language of the statute and accompanying regulations.* . . . In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading. Moreover, *because his opinions were calculated to "invade the province of the court to determine the applicable law and to instruct the jury as to that law," they could not have been helpful to the jury in carrying out its legitimate functions.*

846 F.2d at 139-40 (emphasis added) (citations omitted).

In the Sixth Circuit case of *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984), the court held that it was a reversible error to allow the testimony of an expert witness, a former bankruptcy judge, regarding the meaning of the law, finding it to be a violation of the general rule that only "the trial judge may instruct the jury as to law." *Id.* at 387.

In *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993), *as amended*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied, Mariani v. United States*, 115 S. Ct. 939 (1995), the Ninth Circuit found as "manifest error," the admission of expert testimony on contested issues of law in lieu of instructing the jury. 35 F.3d at 1287. In that case the central issue at trial was the meaning of a National Pollution Discharge Elimination System permit. The district court permitted expert witnesses "familiar with the wastewater management field to testify about the various technical terms

within and obligations imposed by the permit." *Id.* However, the court failed to resolve the conflicts in interpretation of the permit in its jury charge, electing instead to instruct the jury to "construe the permit based on the plain meaning of the language therein and the testimony of the expert and other witnesses." *Id.*

The Ninth Circuit found this to be error (at least harmless in that case) because the district court did not decide the issues of law raised by the parties. Thus, the "jurors applied their own rendition(s) of the law presumably derived to some degree from the conflicting expert testimony, to the facts." 35 F.3d at 1287.

Contrary to *Weitzenhoff* and the other cases cited above is the Eleventh Circuit case of *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985). In *Gold* the Eleventh Circuit affirmed the district court's decision allowing expert testimony on the meaning of certain Medicare regulations. The Court found that testimony on the meaning of the regulations did not intrude upon the responsibilities of the district court. The Court also affirmed the use of such expert testimony "*because* the trial judge here was *careful to instruct the jury about the weight that should be given expert testimony* . . . his decision to admit their opinions was proper." *Id.* at 817 (emphasis added).

The district court in the case before this Court relied upon *Gold* in allowing the nine lay witnesses to testify both to the meaning of various Medicare regulations and the way they bill in their particular areas. Not only does *Gold* conflict with the standards found in other circuits, including prior decisions in the Ninth Circuit, the district judge, with the implicit approval of the Ninth Circuit in the present case, extended the reach of *Gold* to allow lay witness testimony on the meaning of complicated federal

regulations.[12] Moreover, the district court, in allowing the testimony of lay witnesses on this subject, failed to issue a cautionary instruction as *Gold* required in support of its holding that expert testimony on complex regulations was permissible.

The Ninth Circuit did not directly address *Gold* or its own precedent *Weitzenhoff*, nor did it directly face the issue of the use of witness testimony on the ultimate issue. Instead, the Ninth Circuit stated:

> The district court did not qualify these witnesses as experts, however, they testified as lay witnesses regarding industry practices and the common understanding of billing instructions *after* the district court made its decision not to dismiss the indictment on vagueness grounds.

75 F.3d at 475-76 (App. 8) (emphasis added). This holding is dubious on two counts. First, assuming these witnesses were truly not experts, the need for a cautionary instruction (as required in *Gold* for experts) would seem even more compelling; second, it is simply not true that some of these witnesses were not offered as experts. *See, e.g.*, Testimony of Ira Gunn relating to her education, experience and qualifications. RT 186-188.

Strangely, in the paragraph immediately preceding the one in which the Ninth Circuit suggests that these witnesses were merely testifying to "industry practice" and "common understanding," the Ninth Circuit stated:

> The Government called nine ophthalmologists, CRNA's, nurse anesthetists and billing

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[12] *See* Saltzburg, Martin & Capra, 2 *Federal Rules of Evidence Manual*, (6th ed.) at p. 1036: "Since the opinion of a lay witness must be helpful to be admissible, it follows that a lay witness cannot be permitted to draw conclusions of law on the stand. . . ." Citing *United States v. James T. Barnes & Co.*, 758 F.2d 146 (6th Cir. 1985).

> consultants *who testified that continuous actual presence as defined in the regulation meant uninterrupted attendance to one patient at a time.*[13] Appellants argue that the district court erred by admitting the testimony of all nine witnesses, claiming that the interpretation of a regulation is a question of law for the district court, not a factual matter left up to experts.

75 F.3d at 475-76 (App. 8) (emphasis added).

Thus, in one paragraph the Ninth Circuit is saying witnesses testified as to what the regulation "meant." In the second paragraph the Ninth Circuit seems to suggest that they were merely testifying as to "industry practices and the common understanding" and that, for some unexplained reason, this is more acceptable because they were lay witnesses, not experts.

The Ninth Circuit's *Surgery Center* decision not only highlights the conflicts in the circuits but represents the complete erosion of the general prohibition on legal opinion testimony – a trend the Eighth Circuit recently found to be disturbing: *"We cannot agree that the trend is a good one." Police Retirement System of St. Louis*, 940 F.2d at 357 (emphasis added). With the district court's decision in this case, as affirmed by the Ninth Circuit, allowing

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[13] It is a flat mischaracterization of the record to suggest that these witnesses testified concerning "continuous actual presence as defined in the regulations." There was no reference by any of the witnesses to the actual amended 1992 language ("continuous actual presence"). The closest any witness came was witness Gunn who testified that "if it is changed . . . " it was "to add one word to that and that was in relation to continuous personal attendance." RT at 231. This is not to suggest that these witnesses did not testify as to the meaning of the regulations, some of them did. But they did so without even bothering to refer to the specific language of the regulations.

non-experts to testify on the meaning of complex Medicare Regulations, without a cautionary instruction, while at the same time failing to instruct the jury on the regulation at issue, the erosion is now complete.

The convictions must be reversed.

II. THE "DELIBERATE IGNORANCE" INSTRUCTION WAS IMPROPER.

With respect to knowledge, the district court, over Defendants' objections, instructed the jury as follows:

> You are instructed that you may find a defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that the claims that were being submitted to Blue Cross/Blue Shield of Montana for Medicare reimbursement did not represent in whole or in part, personal attendance by a CRNA, a [sic] deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that the defendant actually believed the CRNA was in personal attendance or if you find that the defendant was simply careless.

App. 40. This instruction, also known as a *"Jewell"* or deliberate avoidance instruction, on the facts of this case was so erroneous that this Court must exercise its power of supervision and summarily reverse the lower court. S. Ct. R. 10(a).

A *Jewell* instruction is offered as an alternative to finding that a defendant acted knowingly. *See United States v. Aguilar*, ___ F.3d ___, 1996 U.S. App. LEXIS 1216

(9th Cir. January 25, 1996).[14] The justification for this rule is that "deliberate ignorance and positive knowledge are equally culpable." *Jewell*, 522 F.2d at 700 n. 1. Use of a *Jewell* instruction is limited, however, to those relatively rare cases where the evidence justifies a finding of *"willful blindness." Id.* "It is not enough that the defendant was mistaken, recklessly disregarded the truth, or negligently failed to inquire. Instead, the government must present evidence that the defendant *purposely contrived to avoid learning all of the facts in order to have a defense* in the event of subsequent prosecution. Absent such evidence, the jury might impermissibly infer guilty knowledge on the basis of mere negligence without proof of *deliberate avoidance." Id.*, quoting *United States v. Pacific Hide & Fur*, 768 F.2d 1096, 1098 (9th Cir. 1985).

In the case before this Court, not only is there a complete absence of evidence indicating deliberate avoidance, there is substantial evidence that Defendants were "persistent" in their efforts to learn from the government and its agent, Blue Cross, the proper billing method. *See* Statement of Facts, pp. 8-10. Unknown to defendants, however, the government had decided to build a case

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[14] The court in *Aguilar* quoted with approval then-Circuit Judge Kennedy's dissent in *Jewell*:

> The jury instruction clearly states that Jewell could have been convicted even if found ignorant or "not actually aware" that the car contained a controlled substance. This is unacceptable because true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge. A proper jury instruction based on the Model Penal Code would be presented as a way of defining knowledge, and not as an alternative to it.

Id. at [*8], quoting *Jewell* at 707 (Kennedy, J., dissenting).

against them and thus specifically instructed Blue Cross to *withhold* the very information on correct billing procedures the Defendants were seeking.

This evidence does not, on its face, support the giving of a *Jewell* instruction. Notwithstanding this evidence the Ninth Circuit held giving the *Jewell* instruction was proper because "[a]ppellants may have lacked actual knowledge that their billing practices were illegal, but had reason to believe that their practices may have been illegal *and deliberately failed to investigate* proper billing practices." 75 F.3d at 481 (App. 23) (emphasis added). This is completely contrary to the overwhelming evidence that the Surgery Center's numerous attempts to ascertain the correct way to bill.

Compounding this substantial error is the failure of the district court to instruct the jury on the law applicable to the facts in dispute. The standard announced to the jury through the testimony of the nine lay witnesses, according to the Court, was the *custom and practice* for the anesthesia industry. Thus, absent an instruction on the applicable law, the jury's finding of guilt may well have been premised on an alleged violation of industry custom and practice – not upon any standard of criminal conduct. As this Court is well aware, even in the civil arena, violation of industry custom and practice is simply evidence of negligence. Thus, together with the improper *Jewell* instruction, which allowed the jury to convict on a finding of something less than actual knowledge, the jury was permitted to apply a lesser standard of intent to a standard of conduct in the industry which finds no basis in the law governing billing practice and procedure.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee-Cross-Appellant, v. BRUCE L. ERICKSON and GREAT FALLS EYE SURGERY CENTER, Defendants-Appellants-Cross-Appellees.	Nos. 94-30207, 94-30210, 94-30211 D.C. No. CR-93-00036-PGH **OPINION**

Appeals from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted April 13, 1995
Seattle, Washington

Filed Janaury 22, 1996

Before: POOLE, BOOCHEVER, and WIGGINS, Circuit Judges.

POOLE, Circuit Judge:

The Great Falls Eye Surgery Center (the "Center") and ophthalmologist Bruce L. Erickson, a part-owner and the medical director of the Center, appeal their convictions for Medicare fraud in violation of 18 U.S.C. § 287. They were convicted after jury trial of knowingly and willfully over-billing their patients and the Department

of Health and Human Services ("DHHS") from July 23, 1992 through June 1993 for services provided by their certified registered nurse anesthetists ("CRNA's"). They now claim that the district court committed various errors which, separately and in combination, deprived them of a fair trial. The government cross-appeals their sentences. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the convictions and remand for specific sentencing.

I. FACTS

Bruce L. Erickson is a licensed ophthalmologist in Montana. Dr. Erickson practiced at and is a 50% shareholder and the medical director of the Great Falls Eye Surgery Center in Great Falls, Montana. The Center is an ambulatory surgery center incorporated in December 1988. The Center began performing operations in early 1989. The Center is an approved Medicare provider whose claims are processed through an intermediary, Blue Cross/Blue Shield of Montana ("BC/BS"). The vast majority of the Center's practice involves performing cataract surgery on senior citizens covered by Medicare. Medicare pays 80% of the patients' costs; the patients have a 20% co-payment.

The Center hires CRNA's to administer anesthesia to patients undergoing surgery and to monitor those patients. The Center has used three methods to bill for CRNA services.

Initially, the Center contracted with a CRNA named Gary Andregg. Mr. Andregg testified at trial that he handled the billing for anesthesia services until January

1990, when he asked the Center to take over the billing of anesthesia services. He billed patients for the concurrent services provided by CRNA's when patients were "staged in," with several patients blocked at the same time in preparation for surgery.

Dr. Erickson testified that he was not in any way involved in any determination of how the Center would bill for anesthesia services. In January 1990, Dr. Erickson asked bookkeeper Diane Boland to look into the procedure for the billing of anesthesia services. Ms. Boland testified at trial that she contacted BC/BS, but had difficulty obtaining the information she needed regarding anesthesia base units (the base amount of time Medicare allowed for anesthesia services). She had to file a Freedom of Information Act request to obtain that information. She commenced billing Medicare in the same manner as Mr. Andregg. In January 1992, bookkeeper Jeryl Robinson took over Ms. Boland's billing responsibilities. She testified at trial that she received training from Ms. Boland, who told her to take the starting and ending anesthesia times for a patient from the patient's billing chart. She never received instructions from Dr. Erickson, but followed the system then in place.

On January 9, 1991, the Health Care Financing Administration ("HCFA") assigned Agent Alfonso Gomez to investigate the Center's billing practices. Agent Gomez studied 25 randomly selected Medicare claims submitted by the Center, and found that the Center billed Medicare for overlapping CRNA services. The Center billed as many as 27 hours for the services of a single CRNA in a ten-hour workday. On July 22, 1992, Agent Gomez went to the Center and interviewed Dr. Erickson

and other Center personnel. Agent Gomez informed Dr. Erickson that the Center's method of billing for concurrent CRNA services was not permissible under Medicare regulations. Agent Gomez testified that he was fairly certain that he told Jeryl Robinson the correct way to bill. Ms. Robinson testified that Agent Gomez could not tell her how to bill correctly. She claimed that he told her to contact a local carrier, but could not give her the name of a particular person there who could help her. When she called BC/BS, an agent informed her that the carrier was instructed by Agent Gomez not to speak to anyone at the Center.

Ms. Robinson and Agent Gomez offered two different accounts at trial of the Center's billing practices after July 1992. Ms. Robinson testified that at Dr. Erickson's request, she called the Eye Institute of Utah ("EIU") for billing advice. She testified that she then altered the Center's billing procedure to conform to EIU procedure. She began billing patients for anesthesia time in two blocks – one for anesthesia and one for surgery. She said that she added the total number of minutes in each block to arrive at a single anesthesia time for which she submitted a Medicare claim. Ms. Robinson testified that the total time billed by the Center went down as a result of this change.

Agent Gomez offered a different explanation of the Center's anesthesia billing practices after July 1992. According to Agent Gomez, the Center ceased billing patients for overlapping CRNA services, but continued to bill patients for periods that exceeded the actual time a CRNA spent with a single patient. The Center began billing for CRNA services in continuous back-to-back

blocks, with the anesthesia time for one patient beginning immediately after the anesthesia time for another patient had ended. Agent Gomez indicated that the inflated anesthesia billing periods probably included periods when the patient was away from the CRNA under pre- or post-operative care. He testified that he instructed Dr. Erickson that these pre- and post-operative intervals were ineligible for anesthesia billing where patients were scheduled for consecutive surgeries. He claimed that he told Dr. Erickson that he could bill for five minutes of CRNA services during the pre- and post-operative periods only in cases where an adjacent surgery was not scheduled.

In the summer of 1993, Dr. Erickson and the Center were indicted for one count of mail fraud from January 1990 through June 1993 in violation of 18 U.S.C. §§ 1341 and 1343, and two counts of Medicare fraud in violation of 18 U.S.C. § 287 (False Claims).[1] They were indicted for knowingly and willfully devising an inflated Medicare billing scheme using the federal mail to obtain reimbursements for CRNA services that exceeded those to which they were legally entitled.

A jury trial was held from March 7 through March 12, 1994. The jury reached no verdict on counts I and II, and the district court declared a mistrial on those counts. The jury found Dr. Erickson and the Center guilty on Count III. At a sentencing hearing on May 31, 1994, the district

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[1] Count II covered the period January 1990 through July 1992, and Count III covered the period from July 1992 through June 1993, after appellants were informed that they were under investigation for fraudulent billing practices.

court departed downward from the United States Sentencing Guidelines and sentenced Erickson to two months imprisonment, four months home detention, and three years of supervised release, along with a fine of $50,000. The district court sentenced the Center to serve three years probation and to pay restitution of $11,910 and a fine of $225,549.

Erickson and the Center appeal their convictions. The United States appeals their sentences. Counts I and II are in stipulated abeyance pending this appeal. Erickson was released on bail pending the appeal.

II. VAGUENESS OF THE GOVERNING REGULATION

Appellants claim that the governing regulation is unconstitutionally vague. The regulation, which governs billing for anesthesia services, provides:

> Time units involve the continuous actual presence of the physician (or of the medically directed qualified anesthetist or resident) and start when he or she begins to prepare the patient for anesthesia care and ends when the anesthesiologist (or medically directed CRNA) is no longer in personal attendance, that is, when the patient may safely be placed under post-operative care.

42 C.F.R. § 414.46(a)(2) (1993).

The district court instructed the members of the jury to find the defendants guilty on Count III if they found that the defendants knowingly and willfully

> submitted or caused to be submitted, for Medicare payment, claims for anesthesiological services, well knowing that those claims, while not reflecting overlapping patient attendance, were false and fraudulent, in that they were demands for payment of anesthesia services that were, in whole or in part, not rendered by a physically present provider and were, therefore, not allowable under the regulations providing for Medicare reimbursement, alleged to be in violation of Title 18 U.S.C. § 287.

Appellants claim that the term "continuous actual presence" is ambiguous because it does not define a degree of proximity to the patient. The issue before us is whether the phrase "continuous actual presence" can be held to refer clearly to a continually physically present provider.

Whether a regulation is unconstitutionally vague is a question of law subject to de novo review. *United States v. Emerson*, 846 F.2d 541, 545 (9th Cir. 1988); *United States v. Christopher*, 700 F.2d 1253, 1258 (9th Cir.), *cert. denied*, 461 U.S. 960 (1983). A penal regulation is void for vagueness unless it " 'define[s] the criminal offense with sufficient definiteness that ordinary people can tell what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' " *United States v. Stansell*, 847 F.2d 609, 615 (9th Cir. 1988) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). A regulation is not unconstitutionally vague if that regulation is capable of a limited interpretation such that "(1) ordinary people could understand what conduct is prohibited, and (2) those enforcing the law are provided with clear standards to constrain them." *United States v. Talbot*, 51 F.3d

183, 188 (9th Cir. 1995). In the field of regulatory statements governing business activities, greater leeway is allowed. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).

When placed in context, this regulation is not unconstitutionally vague as to Count III of the indictment. On its face, the regulation clearly limits CRNA reimbursement to periods when the CRNA is actually with and looking after the patient. The regulation requires "personal attendance" that is said to cease when the patient is placed under the care of another.

The trial testimony supports this view. The government called nine ophthalmologists, CRNA's, nurse anesthetists and billing consultants who testified that continuous actual presence as defined in the regulation meant uninterrupted attendance to one patient at a time. Appellants argue that the district court erred by admitting the testimony of all nine witnesses, claiming that the interpretation of a regulation is a question of law for the district court, not a factual matter left up to experts.

The district court did not qualify these witnesses as experts, however. They testified as lay witnesses regarding industry practices and the common understanding of billing instructions *after* the district court made its decision not to dismiss the indictment on vagueness grounds. The district court's decision balancing the probative value of this evidence against its prejudicial effect is reviewed for abuse of discretion. *United States v. Kessi,* 868 F.2d 1097, 1107 (9th Cir. 1989). The district court did not abuse its discretion in admitting their testimony, which was relevant to appellants' claims of mistake and

lack of knowledge and intent. *See United States v. Mayans*, 17 F.3d 1174, 1181-82 (9th Cir. 1994).

Appellants argue that the regulation does not clearly state what is prohibited because an article in the November 1992 trade journal of the American Association of Nurse Anesthetists ("AANA") indicates that:

> the nature of anesthesia practice in [ophthalmologic surgery centers], with its emphasis on preoperative blocking of patients and the possibility of having several patients blocked at the same time, may have resulted in some confusion about Medicare billing.[2]

Ira Gunn and Dan Simonson, *Alert to All CRNA's Regarding Fraudulent Billing for Concurrent Cases*, AANA News Bulletin, Nov. 1992.

Appellants' argument is unconvincing. Two paragraphs later, the article clears any existing confusion by explaining that:

> the CRNA may only bill for that period of time in which he or she is in continuous personal attendance to the patient. The AANA position has always been that a CRNA may not bill for anesthesia time for more than one patient at a time because personal attendance means exclusively one-patient care. In other words, even if several patients are blocked, the CRNA may bill for only one patient at a time.

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[2] The authors of the article testified that they did not feel that there was confusion in the industry, and felt that any existing confusion may have been self-generated.

Id. This article does not support appellants' contention that "continuous actual presence" is capable of a loose definition that allows a CRNA to bill for anesthesia services even where the CRNA is not continually with the patient. If anything, the article shows that appellants had knowledge of the continuous actual presence requirement and acted contrary to that knowledge.[3]

For these reasons, appellants' contention that the government regulation is unconstitutionally vague is rejected.

III. JURY SELECTION

Jury selection began with a pool of 34 potential jurors from the Great Falls Division of the District of Montana. As voir dire progressed, some potential jurors were excused for cause and each side exercised some peremptory challenges. As the pool of potential jurors dwindled, the government noted that it would be difficult to find a jury locally that did not know Dr. Erickson or other doctors at the Center. The court decided to call additional venirepersons to the pool. The court proposed that the clerk be instructed to pull additional venirepersons from

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[3] A related regulation uses a lower standard than "continuous actual presence" to describe physician attendance at concurrent procedures. This regulation allows a physician to direct no more than four concurrent procedures if he is "physically present and available" during all procedures. 42 C.F.R. § 405.552(a)(vi)(1990). The physician may bill for his services during each procedure at a reduced rate set by the regulation. 42 C.F.R. § 414.46(d) (1993). This different standard supports the view that "continuous actual presence" requires more than mere physical availability.

the pool of qualified jurors in the district, limited to a radius of 25 miles outside of Great Falls. Appellants objected to the 25 mile limit and requested that the venirepersons be drawn from the entire panel. The judge denied appellants' request because it would postpone the trial for at least a day while the venirepersons were brought to Great Falls. The existing jury panel was excused for lunch while the additional venirepersons were summoned. During this recess, the government asked the judge to dismiss the entire panel because one perspective juror reported that her niece, a receptionist at the Center, said that Dr. Erickson "did not do it." The defense objected, and the district court denied the motion.[4]

Pursuant to the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869, federal criminal defendants have the right to "grand and petit juries selected at random from a fair cross section of their community in the district or division where the court convenes." 28 U.S.C. § 1861. *See also United States v. Nelson*, 718 F.2d 315, 318 (9th Cir. 1983). A statutory challenge is allowed only for "substantial failure to comply with the Act." *Nelson*, 718 F.2d at 318 (quoting 28 U.S.C. § 1867(a)). Technical violations are insubstantial where they do not frustrate the Act's goals of obtaining jury lists that are a cross-section of the community, allocating jury duty fairly

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[4] The government argues that appellants waived their objection by objecting to the government's request for a new panel. Though there may be some merit to this argument, we need not address the issue because appellants' original objection was without merit.

among the citizenry, and determining disqualifications, excuses, exemptions and exclusions on the basis of objective criteria only. *Id.* at 318; *United States v. Calabrese*, 942 F.2d 218 (3d Cir. 1991); *see* 28 U.S.C. § 1862 (prohibiting discrimination in selection of jury pool).

Section 1866(f) governs juror shortages:

> Where there is an unanticipated shortage of available petit jurors from the qualified jury wheel, the court may require the marshal to summon a sufficient number of petit jurors selected at random . . . in a manner ordered by the court consistent with §§ 1861 and 1862 of this title.

Appellants argue that the district court substantially violated the Act by excluding four Indian reservation lands that were outside the 25 mile radius. Appellants have failed to make out a prima facie case of discrimination. To establish a prima facie violation of the fair cross-section requirement, appellants must show (1) that the excluded group is a "distinctive" group in the community; (2) that the representation of this group in venires is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Appellants have offered no proof as to the second element of this test. Even if appellants could prove the second element, however, they could not establish a systematic pattern of exclusion. *Id.* at 366. An occasional discrepancy, such as the measure taken in this case for the sake of expediency, does not establish a

prima facie violation. *Id.* Therefore, appellants' challenge to the district court's method of jury selection is rejected.

IV. PRIOR BAD ACTS EVIDENCE

Dr. Erickson worked for Dr. Amicucci at St. Peter's Hospital from 1984 through 1986. Over repeated objections by the defense, the district court allowed four witnesses, Dr. Olson, Margaret Ernst, Lisa Murphy and Irene Duke, to testify regarding Dr. Erickson's billing practices while he was employed at St. Peter's.[5] Their testimony revealed that while Dr. Amicucci was away on sabbatical, Dr. Erickson instituted a practice of "fragmenting" or "unbundling." Rather than billing each patient for the entire procedure he performed, he billed each patient for the separate components of the procedure, at a higher cost to that patient and the patient's insurer. He also billed patients for services he never provided. In the spring of 1985, St. Peter's suspended Dr. Erickson's privileges to practice and placed him on probation for one year.

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[5] Ms. Ernst and Ms. Murphy worked as bookkeepers for Dr. Amicucci in 1984 and 1985. Ms. Ernst testified that when Dr. Amicucci left on sabbatical, Dr. Erickson asked her how Medicare paid on different procedures and how they would pay better. She testified that he fragmented each procedure into parts for billing purposes. Ms. Murphy testified that Dr. Erickson once told her that rather than charging for a complete exam, she should bill for the parts of the exam because they were reimbursed at a higher rate. Ms. Duke, an ophthalmological assistant for Dr. Amicucci and Dr. Erickson in 1984 and 1985, testified that Dr. Erickson fragmented his billing. Each witness admitted on cross-examination that these bills did not cover anesthesia and predated the existence of the Center.

In 1986, Dr. Olson, an ophthalmologist and professor at the Utah School of Medicine, was asked to chair a three-person outside investigatory committee to determine whether Dr. Erickson's privileges should be reinstated. The committee held a hearing in which it questioned Dr. Erickson. The written record of the hearing is limited to notes taken and signed by the three committee members, and a report that Dr. Olson made from those notes. Dr. Erickson admitted to the committee that he had billed patients for services not rendered, but that he had decided to stop this practice two months earlier. He admitted that he billed patients for services he had not performed in order to "get better reimbursement for patients." Dr. Olson testified that he understood this comment to mean that Dr. Erickson billed as he did to make more money, since under Medicare, reimbursement goes to the doctor and not the patient.

Dr. Erickson did not directly address his unbundling practices before the committee. The committee, however, reviewed Dr. Erickson's billing records and found many examples of how Dr. Erickson billed for each part of a single procedure, rather than billing for the entire procedure at a lower rate. The committee decided to suspend Dr. Erickson's privileges as a result of this investigation.

The district court instructed the jury that Dr. Olson's testimony applied only to Dr. Erickson, and not to the Center, which came into existence after the 1986 investigation. The district court did not give similar limiting instructions following the testimony of Ms. Ernst, Ms. Murphy and Ms. Duke. Originally, the district court agreed to give the jury a limiting instruction to the effect that Dr. Olson's testimony went to intent or absence of

mistake, but was not admitted for the truth of the matter asserted. Later, however, the judge informed the parties that he would not give such a limiting instruction because Dr. Olson relayed admissions of a party, which are exceptions to the hearsay rule.

Dr. Erickson makes four arguments that this prior bad acts evidence was wrongly admitted. First, he argues that these acts should not have been admitted because they were not proven to be criminal. This contention is wrong. Fed. R. Evid. 404(b) explicitly allows evidence of other crimes, wrongs or acts to show proof of knowledge, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *See also Estelle v. McGuire*, 502 U.S. 62, 69 (1991).

Next, Dr. Erickson argues that the testimony was inadmissible because it was oral rather than written. This argument also fails. Rule 404(b) does not require written evidence, and courts have allowed the oral testimony of witnesses with personal knowledge of prior bad acts where no formal written evidence is available. *See, e.g., United States v. Hill*, 953 F.2d 452, 456 (9th Cir. 1991) (witness presented oral evidence of defendant's prior drug use).

Third, Dr. Erickson claims that the government did not give him pretrial notice under Rule 404(b) of its intent to use Dr. Olson's testimony that Dr. Erickson charged Medicare for services not rendered. Rule 404(b) requires "reasonable notice in advance of trial . . . of the general nature of any [Rule 404(b)] evidence [the government] intends to introduce at trial. This contention fails. The government satisfied the requirement by turning over to

appellants prior to trial Dr. Olson's statements that Dr. Erickson billed for services not rendered, practiced unbundling, and billed for services not listed on patients' charts. Dr. Erickson's attorneys had pretrial notice of Dr. Olson's potential testimony, though they did not know specifically what testimony the government planned to use. Dr. Erickson had sufficient notice. Moreover, Dr. Erickson was not prejudiced by any lack of notice. At trial, Dr. Erickson's attorneys said that they had no notice that this evidence would be used, but "would be prepared to meet it."

Finally, Dr. Erickson argues that the district court erred by electing not to give the additional limiting instruction following Dr. Olson's testimony. Whether the district court correctly construed the hearsay rule is a question of law reviewed de novo. *United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994). Fed. R. Evid. 801(d)(2)(A) provides that "a statement is not hearsay if . . . the statement is offered against a party and is . . . the party's own statement." The district court correctly ruled that Dr. Erickson's statements to Dr. Olson were admissions of a defendant and, as such, were exceptions to the hearsay rule.

The Center also argues that the district court erred by failing to give the jury a limiting instruction following the testimony of Ms. Ernst, Ms. Murphy and Ms. Duke. The Center is correct. Evidence of a defendant's prior bad acts is admissible only against that defendant. *See Huddleston v. United States*, 485 U.S. 681, 685 (1988). However, this error was harmless. Errors which do not rise to constitutional dimensions are harmless if it is more probable than not that the error did not affect the jury's verdict. *Hill*,

953 F.2d at 458. In the instant case, it is unlikely that the district court's omission affected the jury's verdict. The attorney for the Center easily established on cross-examination that the acts described all occurred several years before the creation of the Center. Moreover, the evidence served another purpose in the trial – to illustrate Dr. Erickson's intent, knowledge and lack of mistake. *See McGuire*, 502 U.S. at 69.

V. VOLUME OF BUSINESS GENERATED BY THE CENTER

The district court allowed testimony that appellants received between $1.3 and 1.9 million per year from Medicare for each of the years in question. Appellants argue that this was error because a large portion of those payments was for non-anesthesia charges which are irrelevant to this case. The government argues that the numbers were offered to show the volume and sophistication of the operation and to negate appellants' claims of mistake and lack of knowledge or intent.

Appellants also claim that the district court erred by allowing testimony that the number of cataract surgeries in the Great Falls area increased dramatically following the 1989 opening of the Center. Appellants argue that this information is not relevant to anesthesia services.

We review the district court's decisions balancing the probative value of evidence against its prejudicial effect for abuse of discretion. *Kessi*, 868 F.2d at 1107. The district court did not abuse its discretion in allowing the evidence of revenue and of the number of operations performed. It was within the court's discretion to determine

that this evidence revealed the sophistication of the operation and was relevant to appellants' defenses of mistake and lack of knowledge and intent to commit Medicare fraud. *See United States v. DeSalvo*, 41 F.3d 505, 509-510 (9th Cir. 1994).

VI. RECALL OF WITNESSES

The government recalled two witnesses, Julie Eby and Marsha Vanderhoff, who remained in the courtroom after their initial testimony.

Ms. Eby, an employee of the fraud and abuse unit of BC/BS, reviewed appellants' file during Agent Gomez' investigation of their billing practices. The government used this witness to lay a foundation for her investigation notes and the records she received during the investigation. When the district court released her, the judge told her she was "free to go" or "welcome to stay." Neither side objected. She remained in the courtroom during the testimony of four witnesses including Agent Gomez (who was recalled later) and Betty Hibbert, a manager of accounting systems for BC/BS of Montana. Agent Gomez testified regarding Exhibit 4, a computer printout of monies paid to the Center from 1990 through 1992. Payments were divided into three categories – a surgery fee, a facility fee, and an anesthesia fee.

The government used Ms. Hibbert's testimony to lay a foundation for Exhibit 4. Ms. Hibbert testified that she retrieved 1991 billing reports off the computer for Agent Gomez, and had access to and had seen the 1990 and 1992 reports. The government attempted to introduce all three

reports as Exhibit 4. When the defense objected, the government decided to offer the 1991 report and to recall Julie Eby to lay a foundation for the 1990 and 1992 reports. The court refused to exclude Ms. Eby's testimony on recall. She testified that monthly payment reports were generated automatically by the computer. She gathered the reports for 1989, 1990 and 1992 and supplied them to Agent Gomez. The court admitted the 1990 and 1992 reports as well as the rest of Exhibit 4.

Marsha Vanderhoff, a manager of public and provider relations for Medicare, testified that she ran workshops and wrote publications for Medicare providers to clarify Medicare policies and regulations. In early 1989, she distributed a memo regarding the reduction of base units for physicians concurrently directing two or more nurse anesthetists. She was released and told by the judge that she was "free to go" or "welcome to stay." No party objected. She remained in the courtroom for approximately one hour of the government's case, although the government had asked her to remain outside the courtroom. The district court refused appellants' motion to exclude her testimony on rebuttal. She testified that she put on annual Medicare workshops, and that her records showed that Dr. Erickson and a staff member signed in to two of those workshops. She also said that Agent Gomez told her to route all billing questions concerning the Center to him after July 1992.

A district court's control over the examination of witnesses at trial is reviewed for an abuse of discretion. *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1384 (9th Cir. 1991).

The district court did not abuse its discretion when it allowed these witnesses to be recalled. Exclusion of a witness is a strongly disfavored sanction. *United States v. Hobbs*, 31 F.3d 918, 921-22 (9th Cir. 1994).[6] Moreover, the testimony of Ms. Eby and Ms. Vanderhoff was not cumulative and was relevant. *Id.* at 922. Ms. Eby laid a foundation for a computer-generated report based on her dealings with the report. It is unlikely that she would have testified differently on this subject had she been absent during the earlier testimony. Ms. Vanderhoff testified that Dr. Erickson and a staff member signed in to two of her annual Medicare billing workshops. This relevant testimony likewise presents a small danger of contamination. Ms. Vanderhoff also testified regarding her conversation with Agent Gomez regarding billing inquiries. Appellants allege that she tailored this testimony on rebuttal to smooth over the inconsistencies in the testimony of Agent Gomez and Jeryl Robinson. Rather than moving to exclude her later testimony, appellants should have remedied any error occurring from this influence on her testimony through the usual remedy of cross-examination. *Id.* at 922.

Appellants' challenges to the district court's handling of these rebuttal witnesses are rejected.

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[6] Appellants' reliance on *United States v. Ell*, 718 F.2d 291 (9th Cir. 1983), is misplaced. This case addresses the district court's refusal to exclude witnesses from the courtroom after their initial testimony upon defendant's request pursuant to Fed. R. Evid. 615. *Ell* does not govern cases such as the case at bar in which a witness violates the court's exclusionary order, or a party fails to request a general exclusionary order. *Id.* at 293.

VII. CROSS-EXAMINATION OF DEFENSE WITNESSES

Defense witness Jeryl Robinson testified that Dr. Erickson told her to call Dr. Lyle's office at the EIU for billing advice which she adopted in July 1992. On cross-examination, the government asked Ms. Robinson whether anyone at Dr. Lyle's office told her that the office had been under investigation in the mid-1980's for its billing practices, and that it later discontinued those practices. The defense objected to this question and requested a mistrial on the grounds that the question was deliberately prejudicial, that there was no reason for a bookkeeper to know about the investigation, and that there was no reasonable foundation for the question. The district court overruled the objection and refused to grant a mistrial.

A court's control over the manner of questioning at trial is reviewed for an abuse of discretion. *United States v. Perkins*, 937 F.2d 1397, 1405 (9th Cir. 1991). The district court's decision denying a motion for mistrial is subject to an abuse of discretion standard. *United States v. Homick*, 964 F.2d 899, 906 (9th Cir. 1992).

It is relevant whether the Center had knowledge that the billing model that it adopted in 1992 had come under scrutiny. The district court abused its discretion by allowing the prosecutor's question without requiring the prosecutor to develop a foundation for the question. However, this error was harmless. The objection was to a few sentences in a trial that lasted a week and spans nearly 1000 pages of testimony. *See United States v. Gering*, 716 F.2d 615, 621 (9th Cir. 1983). Improper prosecutorial

remarks alone do not justify reversal in an otherwise fair proceeding. *Hill*, 953 F.2d at 460.

VIII. JURY INSTRUCTIONS

Over appellants' objections, the district court gave the jury a *Jewell* or "deliberate ignorance" instruction. *See United States v. Jewell*, 532 F.2d 697 (9th Cir.) (en banc), *cert. denied* 426 U.S. 951 (1976). This instruction allowed the jury to find appellants guilty if it determined that appellants had actual knowledge that they were committing Medicare fraud, or if it determined that appellants adopted an attitude of willful blindness toward the CRNA billing regulations and kept themselves deliberately ignorant of the billing regulations.

Whether a jury instruction misstated the elements of a statutory crime is a question of law reviewed de novo. *United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991) (citations omitted).

A deliberate ignorance instruction is appropriate only where there is evidence that the defendant may have purposely avoided learning the facts or shut his eyes to avoid learning the existence of a fact he all but knew. *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992). A deliberate ignorance instruction is inappropriate where the only evidence alerting the defendant to the high probability of criminal activity is direct evidence of the

illegality itself. *Sanchez-Robles*, 927 F.2d at 1074; *Mapelli*, 971 F.2d at 287.[7]

In this case a *Jewell* instruction was proper. Appellants' defense was lack of knowledge or intent and mistake. Appellants claim both that they were not aware of the correct way to bill Medicare for CRNA services, and that they attempted to but were unable to decipher the correct billing methods. There is evidence to support a deliberate ignorance theory. Appellants may have lacked actual knowledge that their billing practices were illegal, but had reason to believe that their practices may have been illegal and deliberately failed to investigate proper billing practices. Therefore, appellants' challenge to the jury instructions is rejected.

IX. CUMULATIVE EFFECT OF ERRORS

The district court erred by failing to instruct the jury that the testimony of Ms. Ernst, Ms. Murphy and Ms. Duke (the bad acts witnesses) went only to Dr. Erickson and not to the Center. The district court also erred by allowing the prosecutor to ask a question of Jeryl Robinson without developing a proper foundation for that question. These errors are harmless both singly and in

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[7] An improperly given *Jewell* instruction requires reversal unless the reviewing court determines that it was harmless beyond any reasonable doubt. *Sanchez-Robles*, 927 F.2d at 1075; *Mapelli*, 971 F.2d at 287. The instruction does not call for reversal where the evidence of actual knowledge is "so overwhelming as to compel a guilty verdict." *Sanchez-Robles*, 927 F.2d at 1075. The reviewing court cannot substitute its judgment for that of the trier of fact. *Id.*

combination. It is unlikely that the combination of these errors materially swayed the jury's verdict. *See Hill*, 953 F.2d at 458.

X. SENTENCING

The district court considered the evidence relevant to Counts I and II in sentencing appellants. The Guideline range was 21 to 27 months imprisonment. The district court departed downward and sentenced Erickson to two months confinement, four months home detention and three years of supervised release, and the Center to three years probation. The government asked the court to consider conduct under the first two counts, but only if it would lead to a harsher sentence. The district court briefly stated its reasons for departing downward: "[U]nder the totality of what's going to happen here and what has happened and almost certain to happen in the future, I think that's adequate."

Review of departures from the Sentencing Guidelines is made under the three-part test established in *United States v. Lira-Barraza*, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc). First, the reviewing court must determine whether the trial court had the legal authority to depart. The district court here had the legal authority to depart downward pursuant to U.S.S.G. § 2F1.1 (1992). Next, the appellate court reviews for clear error the factual findings in support of the mitigating circumstance identified by the district court as a basis for departure. In this case, it is difficult to review the district court's findings for clear error, since the district court did not specifically state the factual findings on which it relied.

Finally, the reasonableness of the extent of the district court's departure is reviewed "in light of the structure, standards and policies of the Act and the Guidelines." *Id.* at 746-47. The district court must explain the reasoning for both the direction and degree of its departure in sufficiently specific language to allow meaningful review. 18 U.S.C. § 3553(c)(2); *Lira-Barraza*, 941 F.2d at 751. In the present case, the district court failed to expressly adopt the presentence report or to explain the reasoning for its downward departure. The district court made only a vague general statement regarding the possible retrial of Counts I and II and related civil suits that could be brought. Even the parties at the sentencing hearing were confused as to whether the court had departed downward and what conduct it had considered. We therefore remand the case to the district court for more specific findings as to appellants' sentences. *United States v. Carlisle*, 907 F.2d 94, 96 (9th Cir. 1990) (per curiam).

Appellants' convictions are **AFFIRMED**. Their sentences are **REMANDED** to the district court for specific findings regarding the offense level and the downward departure.

COUNSEL LISTING

W. William Leaphart, Leaphart Law Firm, Helena, Montana, for defendants-appellants-cross-appellees.

Keith Strong and David Dennis, Dorsey & Whitney, Great Falls, Montana, for defendants-appellants-cross-appellees.

Carl Rostad, Assistant United States Attorney, Great Falls, Montana, for plaintiff-appellee-cross-appellant.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BRUCE L. ERICKSON and GREAT FALLS EYE SURGERY CENTER, Defendants.	NO. CR-93-036-GF JUDGMENT AND COMMITMENT (Filed June 13, 1994)

On the 31st day of May, 1994, came Carl E. Rostad, Assistant United States Attorney for the District of Montana, and the defendant, BRUCE L. ERICKSON, appearing in his proper person and represented by his counsel, Keith Strong, Attorney at Law, P.O. Box 1566, Great Falls, Montana 59403 (406) 727-3632.

And the defendant having been convicted on his plea of not guilty, and a verdict of guilty by a jury, of the offense charged in Count III of the Indictment in the above-entitled cause, to-wit: From on or about the 23rd day of July, 1992, and continuing thereafter until on or about June of 1993, at Great Falls, in the State and District of Montana, and other places, the defendants, BRUCE L. ERICKSON and GREAT FALLS EYE SURGERY CENTER,

did knowingly and willfully make or present to a department or agency of the United States, that is the Department of Health and Human Services, claims upon or against the United States, or any department or agency thereof, knowing such claims to be false, fictitious, or fraudulent in that, the defendants, BRUCE L. ERICKSON and GREAT FALLS EYE SURGERY CENTER, submitted or caused to be submitted, for Medicare payment, claims for anesthesiological services, well knowing that those claims, while not reflecting overlapping patient attendance, were false and fraudulent, in that they were demands for payment of anesthesia services that were, in whole or in part, not rendered by a physically present provider and were, therefore, not allowable under the regulations providing for Medicare reimbursement, in violation of Title 18 U.S.C. § 287.

And the defendant having been now asked whether he had anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary appearing or being shown to the court,

IT IS THE JUDGMENT OF THE COURT that a fine in the amount of $50,000 is imposed upon the defendant, BRUCE L. ERICKSON, under authority of 18 U.S.C. §§ 3553, 3571 and 3572, in conjunction with 18 U.S.C. § 3287; and IT IS THE FURTHER JUDGMENT OF THE COURT THAT BRUCE L. ERICKSON is hereby committed to the custody of the Bureau of Prisons for a term of two (2) months, under authority of 18 U.S.C. §§ 3553, 3581 and 3582. In that regard, it is recommended that defendant be placed at the Great Falls Transition Center. Upon release from the foregoing term of imprisonment, defendant is placed on supervised release for a term of

three (3) years. In that regard, the defendant is advised that he shall report in person to the United States Probation Office in the District of Montana within 72 hours of release from custody of the Bureau of Prisons. The defendant is further advised that during the period of his supervised release, he shall comply with the following conditions:

(1) he shall not commit another Federal, state or local crime;

(2) he shall comply with the standard conditions that have been adopted by this court;

(3) he shall serve four (4) months of home detention with surveillance provided by electronic monitoring, with the expense of such monitoring borne by the defendant; and the conditions of the home arrest will be determined by the United States Probation Officer;

(4) he shall make restitution in the amount of $11,910, due within thirty (30) days of the date of sentencing, and payable to the United States Attorney; the sum of $9,528.00 shall be disbursed by the United States Attorney to the Department of Health & Human Services; and the sum of $2,382.00 shall be disbursed in the form of donations to organizations involved with the aging, as directed by the United States Probation Officer;

(5) he shall ensure the fine imposed upon him in the amount of $50,000 is paid within thirty (30) days of the date of his release from imprisonment; and

(6) he shall pay to the United States the additional monetary sum of FIFTY AND NO/100 dollars ($50.00), to

be deposited into a special Crime Victims Fund, pursuant to 18 U.S.C. § 3013, payable immediately.

IT IS FURTHER ORDERED that BRUCE L. ERICKSON surrender himself at the institution designated by the Bureau of Prisons upon notification by the United States Marshal.

DATED this 13 day of June, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. BRUCE L. ERICKSON and GREAT FALLS EYE SURGERY CENTER, Defendants.	NO. CR-93-036-GF JUDGMENT AND ORDER (Filed June 23, 1994)

Upon motion of defendant, GREAT FALLS EYE SURGERY CENTER, INC., and good cause appearing therefor,

IT IS HEREBY ORDERED that the Judgment and Order entered on June 13, 1994, is amended as follows, specifically paragraph 4 on page 3 thereof:

On the 1st day of June, 1994, came Carl E. Rostad, Assistant United States Attorney for the District of Montana, and the defendant, GREAT FALLS EYE SURGERY CENTER, INC., a corporation, appearing by and through J. R. Crabtree, and represented by its counsel, W. William Leaphart, Attorney at Law, #1 North Last Chance Gulch, Helena, Montana 59601 (406) 442-4930.

And the defendant having been convicted on its plea of not guilty, and a verdict of guilty by a jury, of the offense charged in Count III of the Indictment in the

above-entitled cause, to-wit: From on or about the 23rd day of July, 1992, and continuing thereafter until on or about June of 1993, at Great Falls, in the State and District of Montana, and other places, the defendants, BRUCE L. ERICKSON and GREAT FALLS EYE SURGERY CENTER, did knowingly and willfully make or present to a department or agency of the United States, that is the Department of Health and Human Services, claims upon or against the United States, or any department or agency thereof, knowing such claims to be false, fictitious, or fraudulent in that, the defendants, BRUCE L. ERICKSON and GREAT FALLS EYE SURGERY CENTER, submitted or caused to be submitted, for Medicare payment, claims for anesthesiological services, well knowing that those claims, while not reflecting overlapping patient attendance, were false and fraudulent, in that they were demands for payment of anesthesia services that were, in whole or in part, not rendered by a physically present provider and were, therefore, not allowable under the regulations providing for Medicare reimbursement, in violation of Title 18 U.S.C. § 287.

And the defendant having been now asked whether it had anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary appearing or being shown to the court,

IT IS THE JUDGMENT OF THE COURT that a fine in the amount of $225,599.00 is imposed upon the defendant, GREAT FALLS EYE SURGERY CENTER, INC., under authority of 18 U.S.C. §§ 3553, 3571 and 3572, in conjunction with 18 U.S.C. § 3287; and IT IS THE FURTHER JUDGMENT OF THE COURT that defendant is placed on probation for a term of THREE (3) YEARS, under authority of 18 U.S.C. § 3553, 3561, 3562 and 3563.

The defendant is advised that during the period of probation, it shall comply with the following conditions:

(1) it shall not commit another Federal, state or local crime;

(2) it shall comply with the standard conditions that have been adopted by this court;

(3) it shall make restitution in the amount of $11,910, due within thirty (30) days of the date hereof, payable to the United States Attorney; the sum of $9,528.00 shall be disbursed by the United States Attorney to the Department of Health & Human Services; and the sum of $2,382.00 shall be disbursed in the form of donations to organizations involved with the aging, as directed by the United States Probation Officer;

(4) it shall pay the fine imposed in the amount of $225,599.00 to the United States, less an offset of $25,000.00 (one-half of the $50,000.00 fine imposed upon defendant Bruce L. Erickson), within thirty (30) days of the date hereof; and

(5) it shall pay a fine to the United States in the amount of TWO HUNDRED AND NO/100 dollars ($200.00), to be deposited into a special Crime Victims Fund, pursuant to 18 U.S.C. § 3013, payable immediately.

DATED this 24th day of June, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

18 U.S.C. § 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title. (As amended Oct. 27, 1986, Pub.L. 99-562, § 7, 100 Stat. 3169.)

42 CFR § 405.553 Reasonable charges for anesthesiology services.

(a) *General rule.* In determining reasonable charge payment for anesthesiology services that meet the conditions in § 405.552(a), the carrier will follow the rules in paragraph (b) or (c) of this section.

(b) *Services furnished by the anesthesiology or by an anesthetist employed by the anesthesiologist.* (1)(i) the provisions of this paragraph apply to anesthesia services furnished by an anesthesiologist without the assistance of an anesthetist or to anesthesia services furnished to hospital outpatients or SNF or CORF patients by an anesthetist who is employed by an anesthesiologist.

(ii) Except as provided in paragraph (b)(4) of this section, anesthesia services furnished to a hospital inpatient by an anesthetist under the medical direction of an anesthesiologist will be paid for in accordance with paragraph (c) of this section.

(iii) If the anesthetist who administers anesthesia under the direction of the anesthesiologist is employed by the anesthesiologist, the carrier will determine the amount of payment for the services under the reasonable charge rules for physician services in providers in § 405.551 and the general reasonable charge rules in §§ 405.501 through 405.508.

(2) In determining reasonable charges for these anesthesia services, the carrier will allow for no more than one time unit for each 15

minute interval, or fraction thereof, beginning from the time the physician or anesthetist begins to prepare the patient for induction of anesthesia, and ending when the patient may be safely placed under post-operative supervision and the physician or anesthetist is no longer in personal attendance.

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42 CFR Ch. IV (10-1-90 Edition)

§ 405.552 Conditions for payment of charges; Anesthesiology services.

(a) *Services furnished directly or concurrently.* The carrier will reimburse a physician for anesthesiology services furnished to patients in a provider on a reasonable charge basis only if the services meet the conditions for reasonable charge payment in § 405.550(b) and the following additional conditions are met:

(1) For each patient, the physician –

(i) Performs a pre-anesthetic examination and evaluation;

(ii) Prescribes the anesthesia plan;

(iii) Personally participates in the most demanding procedures in the anesthesia plan, including induction and emergence;

(iv) Ensures that any procedures in the anesthesia plan that he or she does not perform are performed by a qualified individual;

(v) Monitors the course of anesthesia administration at frequent intervals;

(vi) Remains physically present and available for immediate diagnosis and treatment of emergencies; and

(vii) Provides indicated postanesthesia care.

(2) The physician either performs the procedure directly, without the assistance of an anesthetist, or directs no more than four anesthesia procedures concurrently, and does not perform any other services while he or she is directing the concurrent procedures.

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42 CFR Ch. IV (10-1-92 Edition)

§ 414.46 Additional rules for payment of anesthesia services.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Base unit* means the value for each anesthesia code that reflects all activities other than anesthesia time. These activities include usual pre-operative and post-operative visits, the administration of fluids and/or blood incident to anesthesia care, and monitoring procedures.

(2) *Time units* involve the continuous actual presence of the physician (or of the medically directed qualified anesthetist or resident)

and start when he or she begins to prepare the patient for anesthesia care and ends when the anesthesiologist (or medically directed CRNA) is no longer in personal attendance, that is, when the patient may be safely placed under post-operative care.

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Rule 7. The Indictment and the Information

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(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

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Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did to have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937; Pub.L. 98-473, Title IV, § 406, Oct. 12, 1984, 98 Stat. 2067.)

JURY INSTRUCTION

You are instructed that you may find a defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that the claims that were being submitted to Blue Cross/Blue Shield of Montana for Medicare reimbursement did not represent, in whole or in part, personal attendance by a CRNA, a [sic] deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed the CRNA was in personal attendance or if you find that the defendant was simply careless.
